Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-648

CITY OF SAN ANTONIO,
Petitioner,

VS.

SAN PEDRO NORTH, LTD., et al.
Respondents.

Opposition To Petition For Writ Of Certiorari

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San Pedro North, Ltd.

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CITY OF SAN ANTONIO,
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SAN PEDRO NORTH, LTD., et al.
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, San Pedro North, Ltd., files this Opposition to the Petition for a Writ of Certiorari to the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, and prays that such writ be denied.

JURISDICTION

Pretitioner claims jurisdiction under 28 U.S.C., Sec. 1257(3).

Such jurisdiction does not exist because Petitioner did not raise a Federal question in the State courts at any level.

At the trial court level Petitioner, as defendant, filed only a general denial (Appendix A hereto) and did not present any testimony, or other evidence at the trial.

At the intermediate appellate level Petitioner, as Appellee, filed counterpoints which did not raise a Federal question (Appendix B hereto.) The same is true of its assignments of error in its motion for rehearing filed in the same court (Appendix C hereto).

At the Texas Supreme Court level petitioner, in its

application for a writ of error, filed points of error which did not raise a Federal question (Appendix D hereto). The same is true of its points of error in its motion for rehearing filed in the same court (Appendix E hereto).

Petitioner attempts to rely for its Federal question on the fact that it cited and argued the case of **City of Eastlake v. Forest City Enterprises, Inc.,** 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976) in its briefs in the Court of Civil Appeals and in the Texas Supreme Court. (Petition, pp. 7-8).

To begin with, the City does not even pretend the so called Federal question that it claims it has raised was raised in its own behalf but rather in behalf of its "citizens." Petition, p. 12. No citizen is a party to this suit. Only a party whose Federal right has been denied is entitled to a writ of error to review final judgment of state court. **McNultee v. Lockridge,** (1899) 141 U.S. 327, 35 L.Ed. 796, 12 S.Ct. 11. The City does not seek any relief in its own behalf as a corporate entity.

Furthermore, the attention of the state court must be directed to the particular section of the Federal Constitution or statute on which reliance is placed and the challenge should be distinct and substantial. **Maxwell v. Newbold,** 18 How. 511, 15 L.Ed. 506; **House v. Road Improvement District No. 2,** 266 U.S. 175, 69 L.Ed. 229, 45 S.Ct. 60. Petitioner did not cite or invoke any Federal constitutional provision at any stage of this case to any extent until it did so, as an afterthought, in its motion for rehearing, Texas Supreme Court (Appendix F hereto). It will be noted that such constitutional provisions are invoked solely in behalf of its citizens and not of itself.

There is, of course, no dispute as to the fact that the state courts did not consider and decide the alleged Federal question.

Petitioner could not, in any event, raise such point for the first time at the Texas Supreme Court level. That Court only considers (on application for writ of error) points raised in the motion for rehearing in the Court of Civil Appeals. Rule 469(e), Texas Rules of Civil Procedure (Appendix G hereto). (See Appendix C, motion in Court of Civil Appeals.) In the case of **Rooker v. Fidelity Trust Company,** 261 U.S. 114, 67 L.Ed. 556, 43 S.Ct. 288, it was held that if "All that appears is that, after a judgment of affirmance, the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late." (Citing authority.) "Federal questions, like others, should be presented in an orderly way before judgment." (Citing authority.)

That is, in every essential respect, the exact situation here.

The record in this case demonstrates that Petitioner has wholly failed to meet the jurisdictional requirements of the U.S. Supreme Court for a writ of certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case," while essentially correct, contains some omissions and inaccuracies. We will ignore all of these which we do not deem to be important here.

One omission which should be pointed out is that Petitioner fails to state that there was no evidence whatever introduced at the trial in the District Court that the permitted uses under the zoning in question would pollute

the aquifer to any extent. (As stated above, Petitioner presented no evidence of any kind at the trial). The Respondent's evidence did show that Respondent's proposed use was in full compliance with the City's own code provisions for the protection of the Edward's Undeground Recharge Zone and other regulations applicable to this aquifer. Although not directly relevant to the issue here this needs to be stated to put the subject matter of the controversy which gave rise to this litigation in perspective.

SUMMARY OF THE ARGUMENT

We will respond to the Petition in three parts: I. "Eastlake;" II. "Procedural Step or a Repeal;" III. "the Tenth Amendment and the Police Power."

These arguments can be summarized as follows:

I. **Eastlake.** That case can be completely distinguished from this case because the constitutional provisions of the States of Ohio and Texas, as well as their statutes and case law, respecting the right of referendum, the powers of home rule cities, and the control of cities over zoning changes are completely different. Both sets of laws are compatible with the U.S. Constitution which neither mandates the use of referendum for zoning purposes nor denies its use.

II. **Procedural Step or a Repeal?** The referendum petitions in question specifically called for the repeal of the zoning ordinance in question. This was the issue submitted to the people and the City Council, in declaring the result, declared the zoning ordinance repealed. Even assuming, arguendo, that the referendum was a mere procedural step and not a repeal, the zoning law of the State would definitely not permit any city to add or subtract from the procedural steps established by State law under Texas law.

III. **The Tenth Amendment and the Police Power.** This amendment to the U.S. Constitution reserves the powers not delegated to the United States "to the States respectively, or to the people." The State of Texas is the repository of the police power not delegated to the United States and in delegating part of this power (such as the power to zone and rezone the use of land) to its subordinate units of government (such as the City of San Antonio) it can by its constitution and general laws regulate and limit the use of such delegated police power.

ARGUMENT

I.
EASTLAKE

Petitioner places overwhelming reliance on the Eastlake case **(City of Eastlake v. Forest City Enterprises,** 426 U.S. 668, 49 L.Ed.2d 132, 96 S.Ct. 2358 [1976]) in spite of the fact that it is utterly distinguishable from this case.

The opinion of this Court in Eastlake makes plain the rationale of that decision in the following words:

> "In framing a state constitution, the people of Ohio specifically reserved the power of referendum to the people of each municipality within the State.
>
> " 'The initiative and referendum are hereby reserved to the people of each municipality on all questions which such municipality may now or hereafter be authoried by law to control by legislative action . . .' Ohio Cons Art II, § lf (1955)." 49 L.Ed.2d at 137.

* * * * * *

"Since the rezoning decision in this case was properly reserved to the people of Eastlake under the Ohio Constitution, the Ohio Supreme Court erred in holding invalid on federal constitutional grounds, the charter amendment permitting the voters to decide whether the zoned use of respondent's property could be altered." 49 L.Ed. 2d at 141.

The Texas Constitution does not provide for the referendum at all. (Neither does the U. S. Constitution).

There is no general law of the State of Texas which authorizes the use of the referendum.

The zoning law of the State of Texas does not authorize the use of the referendum. (See Appendix H Petitioner's brief.)

The constitution of the State of Texas, Home Rule Amendment, Art. XI, Sec. 5, makes home rule city charters and ordinances absolutely subordinate to all general laws of the State. (See Appendix G, Petitioner's brief.)

On the other hand, the constitution and laws of the State of Ohio (a) provide for the use of the referendum; (b) provide that a home rule or charter city may enact valid ordinances which are inconsistent with general laws of the State (with execptions, of course) and (c) that the zoning ordinances of such a city take precedence over the general zoning laws of the State of Ohio.

See "Pages Ohio Revised Code Annotated" as follows:

Ohio Constitution, Appendix:

Art. II, Sec. 1f reads as follows (Apendix, Page's, p. 421):

"§ 1f [Power of municipalities.]

"The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall

be exercised in the manner now or hereafter provided by law. (Adopted September 3, 1912.)"

° ° ° ° ° °

Case Notes 3 and 15 under Art. XVIII, Sec. 7 [Home Rule] (Appendix, Page's, pp. 601, 602) read as follows:

"3. A Charter provision as to city government prevails over inconsistent statutes: Fitzgerald v. Cleveland, 88 OS 338, 103 NE 512, AnnCas 1915B, 106; State ex rel Lentz v. Edwards, 90 OS 305, 107 NE 768 [followed in memorandum opinion, State ex rel Hile v. Baker, 92 OS 506]; Billings v. Cleveland R. Co., 92 OS 478, 111 NE 155; State ex rel Hile v. Baker, 92 OS 506, 112 NE 1086; State ex rel Taylor v. French, 96 OS 172, 117 NE 173; State ex rel Cist v. Cincinnati, 101 OS 354, 129 NE 595; Hile v. Cleveland, 107 OS 144, 141 NE 35."

° ° ° ° ° °

"15. Charter provisions adopted pursuant to Const Art XVIII, § 7, relating to matters of local self-government, including the manner of publication of ordinances, will prevail over conflicting and different provisions of the general laws of the state; 1951 OAG No. 654."

The Case Note No. 1 under XVIII, § 7 in the pocket part of the Appendix (Page's 137-138) reads as follows:

"1. Under the home rule provision of the Ohio constitution the people of a municipality have the absolute right to change the fundamental law of the city provided such changes are not repugnant to the constitution: State ex rel Pecyk v. Greene, 102 App 297, 2 00(2) 322."

The general zoning law of Ohio applicable to cities, such as it is, is to be found in Title 7, "Municipal Corporations," Chapter 713: "Planning Commissions," at page 100 of Page's [Title 7].

Very important is the following statute under Title 7

at page 107 which we copy here together with Case Note 1 thereunder:

> "§ 713.14 Sections do not modify any power granted by law or charter. (GC § 4366-12).
>
> "Sections 713.06 to 713.12, inclusive, of the Revised Code do not repeal, reduce, or modify any power granted by law or charter to any municipal corporation or the legislative authority thereof, or impair or restrict the power of any municipal corporation under Article XVIII of the Ohio Constitution."
>
> ° ° ° ° ° °
>
> "HISTORY: GC § 4366-12; 108 v. PtII 1175 (1177). Eff. 10-1-53."
>
> "CASE NOTES"
>
> "See also case notes 3, 4 under RC § 713.06.
>
> "1. This section yields unrestricted powers to municipalities in respect to zoning if such powers are granted by charter: Bauman v. State ex rel Underwood, 122 OS 269, 171 NE 336.

In the case of **Bauman v. State ex rel Underwood** cited above the Supreme Court of Ohio summed up the situation in **that** State, as follows:

> "Zoning regulations are police or sanitary. Under the provisions of section 3, article XVIII, of the Constitution, municipalities may adopt local police or sanitary regulations if 'not in conflict with general laws.' But the provisions of the Akron charter are not in conflict with state law; for section 4366-12, General Code, yields unrestricted powers to municipalities in respect to zoning, if such powers are granted by the municipal charter."

Under Texas law, on the other hand, it has been held time and time again that the cities of the State must comply with the general zoning law of the state without variation. After all, Arts. 101a-1011j (the zoning law of the state) applies to all cities in the state alike, whether home rule or not.

In **Bolton v. Sparks,** 362 S.W.2d 946, the Texas Supreme Court held invalid a zoning ordinance repeal and zoning amendments where there was full notice and hearing but the official notice was published only 14 days before the council meeting in question and not the 15 days prescribed by statute. See page 949.

The position of the Texas Supreme Court on this point was summarized at page 950 of the opinion as follows:

> "The Courts of this State have held ordinances and amendments to ordinances invalid where the express, mandatory provisions of our zoning statute have not been complied with. The steps directed to be taken for notice and hearing, when provided for in the law, are intended for the protection of the property owner, and are his safeguards against the exercise of arbitrary power. Each act required is essential to the exercise of jurisdiction by the City Council, and each must be rigidly performed. Peters v. Gough, Tex.Civ.App. (1935), 86 S.W.2d 515, no writ hist.; Tonray v. City of Lubbock, Tex.Civ.App. (1951), 242 S.W.2d 816, writ ref., n.r.e."

We could cite an abundance of other cases to the same effect. There is no case law contra.

The point need not be belabored. Ohio is free to permit rezoning by referendum. Other states also permit this, such as California, Colorado and others. Such provisions are not repugnant to the U. S. Constitution. **Eastlake,** supra.

Many other states, however, make no provision for the use of the referendum in this (or other) fields of legislation. Texas is one of these. This also is not repugnant to the U. S. Constitution. There is nothing in the U. S. Con-

stitution or the opinions of the U. S. Supreme Court which would indicate in any degree that the use of the referendum in legislation is constitutionally mandated, either in general or with respect to zoning.

II.

PROCEDURAL STEP OR A REPEAL?

Petitioner (on its pages 9 and 10) tries to draw a distinction between the repeal of a zoning ordinance by referendum and its repeal by the legislative body.

While there is no difference possible under Texas law Petitioner's own official acts in this regard negative its contention that the referendum in question was not a repeal of Respondent's zoning ordinance.

See Appendix H hereto which consists of the minutes of the special meeting of Petitioner's Council on January 19, 1976, (introduced in the trial court as Plantiff's exhibit No. 14) "canvassing the returns and declaring the result of a referendum election held January 17, 1976 . . . ."

The City Council solemnly declared the ordinance to be "repealed" because it was "not approved by a majority of the electors voting thereon."

Indeed, the City Charter referendum provision (Art. IV, Sec. 43) states that a referred ordinance which is not approved "shall thereupon be deemed repealed." See Appendix I, Petition, page 25a.

We do not understand the strained distinction Petitioner seeks to make with this semantic quibbling but we do suggest that it has no right to contend that the zoning ordinance in question was not purportedly repealed by the referendum in question in the teeth of its official declaration to the contrary.

It should be pointed out that the zoning ordinance in question (which was not an amendatory zoning ordinance

but gave Respondent's land its original permanent zoning) had been in full effect for several weeks before the referendum petitions were certified and a repeal therof (as distinct from a mere suspension) was a legal necessity from its standpoint.

Be that as it may, the Texas courts have (in many cases) made it quite plain that cities cannot add or substract procedural steps in zoning, repeal or no.

We cite **Luse v. City of Dallas,** 133 S.W.2d 1079, writ refused (1939) at page 1084, and **Cityof San Antonio v. Lanier,** 542 S.W.2d 232, writ refused, n.r.e. (1976). Also, **Bolton v. Sparks,** supra, 362 S.W.2d 946 at 949, Tex. Sup.Ct. (1962). No proposition in Texas law could be better settled—in zoning law or any other field of law. There was nothing "neutral" about the referendum. Respondent's zoning had already gone into effect. The result of the referendum (as declared by the City Council) was to repeal this zoning and in a manner which completely denied Respondent every safeguard of notice and hearing prescribed for zoning changes, amendments and repeals in the zoning statutes of the State of Texas. See Art. 1011e, V.A.C.S. (set out in Appendix H, page 18a, Petition).

III.

THE TENTH AMENDMENT AND THE POLICE POWER

The Tenth Amendment to the United States Constitution is primarily for the purpose of protecting the sovereignty of the several states. Not only are the "states" referred to first, but, we submit, the "people" referred to are the people of the states and not small groups, such as the citizens of a particular city.

The people of the State of Texas adopted its constitution, adopted the Home Rule Amendment (Art. XI, Sec.

5) and elected the legislators who have prescribed the general law of the State on such subjects as referendums, zoning, etc. Petitioner would subordinate this law and these people (of the State) to the people who participated in the city referendum. This would not only stand the law of Texas on its head but that of the United States. There is no oppresion of the minority by the majority here—all live under the same zoning laws alike.

This Court has recently held that under the Tenth Amendment Congress may not exercise power in a fashion that impairs States' integrity or their ability to function effectively in the federal system. **Fry v. United States** (1975), 421 U.S. 542, 44 L.Ed.2d 363, 95 S.Ct. 1792; **National League of Cities v. Usery,** (1976) 426 U.S. 833, 49 L.Ed2d 245, 96 S.Ct. 2465.

The exercise of the police power, such as zoning regulations, is peculiarly an attribute of state sovereignty. Cities are subdivisions of the state government and are peculiarly subject to the regulations prescribed for the exercise of delegated portions of the police power by the States.

This is well stated in Rathkopf, "The Law of Zoning and Planning," Fourth Edition, Vol. 1, Sec. 2.01 [3], as follows:

> "[3] Police Power of Municipalities
>
> "Municipalities, as such, have no police power. The residual police power reposes in the state and not in any of its political subdivisions. A municipality can only exercise police power when it has specifically or impliedly received a delegation of such power from the state. And it can only exercise such power as has been delegated to the extent, and in the manner, delegated."

Many authorities are cited.

The laws of the State of Texas in this regard (mandatory zoning procedures prescribed by State law and not susceptible of being changed at the local level) do not deprive anyone of life, liberty, property or due process. Indeed, the zoning statutes of Texas are much more considerate of due process and the protection of the individual from the arbitrary and emotional sway of an inflamed majority than would be the case if zoning and rezoning was authorized by referendum.

On page 12 of its Petition the City declares that the "constitutional nexus is the Tenth Amendment, which declares the reservation of power by the people unto themselves, and the instrument of its expression here was the referendum process . . . ." The City has in mind only the people who participated in the referendum in question, or at most the people of the City. Never mind the people of the State of Texas and their Constitution!

In Ohio the people of that state, in adopting a constitution and enacting legislation through its representatives, did authorize the people of Eastlake by charter to control zoning by referendum. The people of Texas have not seen fit to do this. The U. S. Constitution nowhere compels them to do so. Petitioner would subordinate the State of Texas and its people to the City of San Antonio and its people. This would be a perversion of both the republican form of government and of the democratic process.

CONCLUSION

The Respondent submits that a writ of certiorari should not be granted for the following reasons:

1. Petitioner did not raise a Federal question in the State Courts. It certainly did not do so in a timely or proper manner.

2. Petitioner's reliance on the Eastlake case is completely inappropriate because the diametrically opposed

provisions of law applicable in this regard between the states of Texas and Ohio distinguish that case completely from this case.

3. Nothing in the United States Constitution mandates the use of the referendum in zoning matters.

4. Attempted zoning changes or repeals by the City of San Antonio by referendum are completely inconsistent with the controlling provisions of the Texas Constitution (home rule amendment) and laws (zoning statutes.)

5. The effect of the referendum here was to repeal illegally Respondent's zoning without according Respondent the procedure for notice and hearing provided by Articles 1011d and 1011e, Vernon's Annotated Texas Statutes. This was void under Texas law.

Respectfully submitted,

HARVEY L. HARDY
2008 N.W. Military Highway
San Antonio, Texas 78213
Attorney For Respondent,
San Pedro North, LTD.

CERTIFICATE

I, Harvey L. Hardy, a member of the Bar of this Court (admitted February 14, 1949), representing Respondent, San Pedro North, Ltd., do certify that this Opposition to Petition for Writ of Certiorari has been served on the following party herein:

On Petitioner by mailing three copies in a duly addressed envelope to William H. Robison, 501 Milam Building, San Antonio, Texas 78205, of Counsel for Petitioner.

I further certify that all parties required to be served have been served.

HARVEY L. HARDY

APPENDIX A
ORIGINAL ANSWER OF DEFENDANT,
CITY OF SAN ANTONIO

NO. 76CI-667

SAN PEDRO NORTH, LTD.	)(	IN THE DISTRICT COURT
VS.	)(	BEXAR COUNTY, TEXAS
CITY OF SAN ANTONIO, ET AL	)(	45TH JUDICIAL DISTRICT

ORIGINAL ANSWER OF DEFENDANT,
CITY OF SAN ANTONIO
TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the CITY OF SAN ANTONIO, Defendant in the above entitled and numbered cause, and files this its Original Answer to Plaintiff's Original Petition and for such answer would respectfully show the Court the following:

I.

Defendant, the CITY OF SAN ANTONIO, enters this general denial and hereby exercises its legal right to require the Plaintiff to prove by a preponderance of the evidence, if any, all of the allegations which have been made in the Plaintiff's Original Petition, if Plaintiff can so prove and therefore, accordingly generally denies the allegations in Plaintiff's Original Petition and demands strict proof thereof by a preponderance of the evidence as is required by the laws of the State of Texas.

WHEREFORE PREMISES CONSIDERED, Defendant, the CITY OF SAN ANTONIO, prays that Plaintiff take nothing by its suit, and that as to Plaintiff's suit, Defendant, the CITY OF SAN ANTONIO, recover all costs of Court.

WILLIAM H. ROBISON
1545 Milam Building
San Antonio, Texas 78205
Attorney for Defendant,
CITY OF SAN ANTONIO

APPENDIX B
EXCERPT FROM "BRIEF FOR APPELLEE, CITY OF SAN ANTONIO"
Filed April 1, 1977

APPELLEE CITY'S COUNTERPOINTS

COUNTERPOINT NUMBER ONE

The Trial, by its take nothing judgment against Appellant, did not err in holding in effect that the repeal of a zoning ordinance by the result of a duly called and conducted referendum election was proper and authorized by the Home Rule Charter of the City of San Antonio, and was consistent with the Constitution and general laws of the State of Texas.

COUNTERPOINT NUMBER TWO

The Trial Court did not err in holding in effect that considering the City's Charter and Texas zoning laws, a referendum election on a zoning matter was authorized in that zoning matters are not among those subjects specifically excluded from the referendum process by the City Charter, nor has such reservation of power to the people been negated by the Constitution or general laws of the State of Texas.

COUNTERPOINT NUMBER THREE

The Trial Court did not err in holding in effect that the voters, in repealing the zoning ordinance passed by the City Council, did not rezone Appellant's property, but rather returned the prior zoning classification to such property.

COUNTERPOINT NUMBER FOUR

The Trial Court did not err in holding in effect that citizens of the City, voting to repeal a zoning ordinance in

an open election, did so in a reasonable and nondiscriminatory way and that such election and the result thereof related directly to the health, safety and welfare of the City and such action was well supported by evidence before the Court.

APPENDIX C
EXCERPT FROM "MOTION FOR REHEARING BY CITY OF SAN ANTONIO"
Filed February 9, 1978

ASSIGNMENTS OF ERROR UPON WHICH THIS MOTION IS PREDICATED

ASSIGNMENT ONE

THE COURT ERRED IN FAILING TO DISTINGUISH BETWEEN THE PROCESS OF INITIATIVE AND REFERENDUM ACTIONS AS SAME APPLY TO THE SUBJECT OF ZONING.

ASSIGNMENT TWO

THE COURT ERRED IN HOLDING THAT LOCAL MUNICIPAL ZONING MATTERS HAVE BEEN EXCLUDED FROM CITIZENS' REVIEW THROUGH REFERENDUM PROCESS IN THAT SUCH PROCESS IS IN CONFLICT WITH PROCEDURAL ASPECTS OF TEXAS ZONING STATUTES, ARTICLES 1011a THROUGH 1011m, TEX. REV. CIV. STAT. ANN. (1963).

ASSIGNMENT THREE

THE COURT ERRED IN HOLDING THAT CITY CHARTER PROVISION RELATING TO RESERVED POWER OF REFERENDUM IN THE ELECTORS ADDED A PROCEDURAL STEP TO TEXAS ZONING STATUTES, ARTICLES 1011a THROUGH 1011m, TEX. REV. CIV. STAT. ANN. (1963).

ASSIGNMENT FOUR

THE COURT ERRED IN HOLDING THAT A HOME-RULE CITY ELECTION, DULY CALLED AND CONDUCTED IN CONFORMITY WITH CITY CHARTER PROVISIONS RELATING TO CITIZENS' RESERVED RIGHTS TO REFERENDUM PROCESS, WAS VOID AS TO ZONING ORDINANCE.

APPENDIX D

EXCERPT FROM "APPLICATION FOR WRIT OF ERROR ON BEHALF OF CITY OF SAN ANTONIO . . ."

Filed March 29, 1978

POINTS OF ERROR UPON WHICH THIS APPLICATION IS PREDICATED

Point of Error One

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT A HOME RULE CITY ELECTION, DULY CALLED AND CONDUCTED IN CONFORMITY WITH CITY CHARTER PROVISIONS RELATING TO CITIZENS' RESERVED RIGHTS TO REFERENDUM PROCESS, WAS VOID AS TO ZONING ORDINANCE. (GERMANE TO ASSIGNMENT OF ERROR FOUR, PETITIONER'S MOTION FOR REHEARING.)

Point of Error Two

THE COURT OF CIVIL APPEALS ERRED IN FAILING TO DISTINGUISH BETWEEN THE PROCESS OF INITIATIVE AND REFERENDUM ACTIONS AS SAME APPLY TO THE SUBJECT OF ZONING. (GERMANE TO ASSIGNMENT OF ERROR ONE, PETITIONER'S MOTION FOR REHEARING.)

Point of Error Three

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT LOCAL MUNICIPAL ZONING MATTERS HAVE BEEN EXCLUDED FROM CITIZENS' REVIEW THROUGH REFERENDUM PROCESS IN THAT SUCH PROCESS IS IN CONFLICT WITH PROCEDURAL ASPECTS OF TEXAS ZONING STATUTES, ARTICLES 1011a THROUGH 1011m TEX. REV. CIV. STAT. ANN. (1963). (GERMANE TO ASSIGNMENT OF ERROR TWO, PETITIONER'S MOTION FOR REHEARING.)

Point of Error Four

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT CITY CHARTER PROVISION RELATING TO RESERVED POWER OF REFERENDUM IN THE ELECTORS ADDED A PROCEDURAL STEP TO TEXAS ZONING STATUTES, ARTICLE 1011a THROUGH 1011m, TEX. REV. CIV. STAT. ANN. (1963). (GERMANE TO ASSIGNMENT OF ERROR THREE, PETITIONER'S MOTION FOR REHEARING.)

APPENDIX E

EXCERPT FROM "PETITIONER, CITY OF SAN ANTONIO'S, MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR"

Filed June 15, 1978

Point of Error One

This Honorable Court erred in not granting the application for writ of error on Point of Error One which reads as follows:

> THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT A HOME RULE CITY ELECTION, DULY CALLED AND CONDUCTED IN CONFORMITY WITH CITY CHARTER PROVISIONS RELATING TO CITIZENS' RESERVED RIGHTS TO REFERENDUM PROCESS, WAS VOID AS TO ZONING ORDINANCE.

Point of Error Two

This Honorable Court erred in not granting the application for writ of error on Point of Error Two which reads as follows:

> THE COURT OF CIVIL APPEALS ERRED IN FAILING TO DISTINGUISH BETWEEN THE PROCESS OF INITIATIVE AND REFERENDUM ACTIONS AS SAME APPLY TO THE SUBJECT OF ZONING.

Point of Error Three

This Honorable Court erred in not granting the application for writ of error on Point of Error Three which reads as follows:

> THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT LOCAL MUNICIPAL ZONING MATTERS HAVE BEEN EXCLUDED FROM CITIZENS' REVIEW THROUGH REFERENDUM PROCESS IN THAT SUCH PROCESS IS IN CONFLICT WITH PROCEDURAI ASPECTS OF TEXAS ZONING STATUTES, ARTILES 1011a THROUGH 1011m TEX. REV. CIV. STAT. ANN. (1963).

Point of Error Four

This Honorable Court erred in not granting the application for writ of error on Point of Error Four which reads as follows:

> THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT CITY CHARTER PROVISION RELATING TO RESERVED POWER OF REFERENDUM IN THE ELECTORS ADDED A PROCEDURAL STEP TO TEXAS ZONING STATUTES, ARTICLE 1011a THROUGH 1011m, TEX. REV. STAT. ANN. (1963).

APPENDIX F

EXCERPT FROM "PETITIONER, CITY OF SAN ANTONIO'S, MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

Filed June 15, 1978

If allowed to stand the Court of Civil Appeals' decision that the right of referendum as contained in the Charter of the City of San Antonio is denied by implication in Articles 1011a through 1011m (Tex. Civ. Stat. Ann.), then Petitioner must, on behalf of its citizens, urge that such statutes and the Court's interpretation thereof is violative of such citizens' rights under Amendment Ten of the Constitution of the United States, which states: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." Further, such statutes and interpretation thereof are violative of the rights of the citizens of San Antonio under the Fourteenth Amendment to the Constitution of the United States which states in part: " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." Further, such statutes and interpretation thereof are violative of such citizens' rights under the First and Fifth Amendments to the Constitution of the United States insofar as such amendments may apply.

APPENDIX G

RUE 469(e), TEXAS RULES OF CIVIL PROCEDURE

(*e*) *Points of Error.* A statement of the points upon which the application is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. Whether the matter complained of originated in the trial court or in the Court of Civil Appeals, it must be assigned as error in the motion for rehearing filed in the latter court.

APPENDIX H

MINUTES

SPECIAL MEETING OF THE CITY COUNCIL OF THE CITY OF SAN ANTONIO HELD IN THE COUNCIL CHAMBER, CITY HALL, ON MONDAY, JANUARY 19, 1976.

The meeting was called to order at 9:00 A.M. by the presiding officer, Mayor Lila Cockrell, with the following members presesnt: PYNDUS, BILLA, CISNEROS, BLACK, HARTMAN, ROHDE, TENIENTE, COCKRELL; Absent: NIELSEN.

76-3 Mayor Cockrell stated that the purpose of the meeting was to canvass the votes of the Special Referendum Election held January 17, 1976.

The members of the City Council then proceeded to canvass the returns of the Election.

After the canvass was complete, the Clerk read the following Ordinance:

AN ORDINANCE 46,247

CANVASSING RETURNS AND DECLARING THE RESULT OF A REFERENDUM ELECTION HELD JANUARY 17, 1976, ON AN ORDINANCE PROVIDING FOR THE ZONING OF CERTAIN PROPERTIES IN THE CITY.

° ° ° °

WHEREAS, Ordinance 45863 passed and approved on October 16, 1975, provided for the zoning of certain properties of the City; and

WHEREAS, prior to the expiration of the period prescribed by Charter, a petition bearing the valid signature of the required number of qualified voters of the City of San Antonio was duly filed requesting that said ordinance be repealed or a referendum election be held on Said Ordinance; and

WHEREAS, the City Council, in response to said petition, by Ordinance 46045 of December 11, 1975, ordered that a referendum election on said ordinance be held on Saturday, January 17, 1976, on said ordinance; and

WHEREAS, said election was duly and legally held on the 17th day of January, 1976, in conformity with the Charter and the election ordinance heretofore passed by the City Council, and the resultof said election has been certified and returned to this Council by the proper officials; and

WHEREAS, this Council has this day considered the returns of said election on the proposition hereinabove stated; and

WHEREAS, said election was in all respects lawfully held and said returns duly and legally made and there were cast at said election the following votes:

January 19, 1976

"Ordinance No. 45863 passed and approved October 16, 1975, providing for the zoning of certain properties in the vicinity of F. M. 1604 and U. S. 281, from 'Temporary R-1' to 'R-1', Single Family Residential District, and 'P-1 (B-2)', Planned Unit Development Business District. FOR THE ORDINANCE."

12,407 votes;

"Ordinance No. 45863 passed and approved October 16, 1975, providing for the zoning of certain properties in the vicinity of F. M. 1604 and U. S. 281, from 'Temporary R-1' to 'R-1', Single Family Residential District, and 'P-1 (B-2)', Planned Unit Development Business District. AGAINST THE ORDINANCE."

44,541 votes;

NOW, THEREFORE:
BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

The referred ordinance (No. 45863) providing for the zoning of certain properties in the vicinity of F. M. 1604 and U. S. 281 was not approved by a majority of the electors voting thereon at the aforementioned referendum election and is, therefore, repealed.

° ° ° ° ° °

After consideration, on motion of Mr. Rohde, seconded by Mr. Pyndus, the Ordinance was passed and approved by the following vote: AYES: Pyndus, Billa, Cisneros, Black, Hartman, Rohde, Teniente, Cockrell; NAYS: None; ABSENT: Nielsen.

The following discussion took place:

MAYOR LILA COCKRELL: I would like to read a memo that I have issued this morning to the Council.

"As an immediate follow-up to the Saturday referendum on the Aquifer zoning case, I am recommending that the City Council request its Planning and Policy Objectives Committee, Chaired by Councilman Glen Hartman, to develop criteria to recommend to City Council for a City request for proposals for a Multi-Disciplinary Research Team. This Team would conduct impartial research into specific areas of concern and advise the City Council on the development of policy affecting the question of development over the Aquifer.

In developing the criteria, the Committee would consult with community leaders for their recommendations as to specific areas of concern and scope of studies which would be covered by the study. In addition, the Planning and Policy Objectives Committee would be requested to furnish the City Council with estimates as to probable costs and length of time the study would require.

January 19, 1976